[Cite as *State v. Kelly*, 2014-Ohio-5840.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	Case No. 14CA3637
	:	
vs.	:	
	:	DECISION AND JUDGMENT
BREON KELLY,	:	ENTRY
	:	
Defendant-Appellant.	:	**Released: 12/30/14**

APPEARANCES:

Breon Kelly, Chillicothe, Ohio, Appellant, Pro Se.

Mark E. Kuhn, Scioto County Prosecuting Attorney, and Jay Willis, Scioto County Assistant Prosecuting Attorney, Portsmouth, Ohio, for Appellee.

McFarland, J.

{¶1} Appellant Breon Kelly filed a notice of appeal from the judgment entry of conviction, "Findings of Fact and Conclusions of Law," filed June 10, 2014 in the Scioto County Court of Common Pleas. Appellee filed a motion to dismiss the appeal due to a lack of jurisdiction. This matter now comes before us following our decision filed August 18, 2014, in which we found Appellant's appeal involved an entry denying post-conviction relief and as such, we have jurisdiction to consider it. For the reasons which follow, we affirm the June 10, 2014 judgment of the trial court and overrule Appellant's assignments of error.

FACTUAL AND PROCEDURAL BACKGROUND

{¶2} We set forth the facts as previously noted in *State v. Kelley*, 4th Dist. Scioto No. 13CA3562, 2014-Ohio-1020, in which we dismissed Appellant's appeal for lack of a final appealable order.[1] On September 21, 2011, the Scioto County Grand Jury returned an indictment charging Appellant with six felony counts, including trafficking in crack cocaine, two counts of possession of drugs, trafficking in drugs/crack cocaine, trafficking in drugs, and possession of criminal tools. The indictment also contained a forfeiture specification. Appellant subsequently entered into a plea agreement whereby he pled guilty to count one, trafficking in crack cocaine, a first degree felony in violation of R.C. 2925.03(A)(1)/(C) (4)(f), along with a forfeiture specification. The trial court's November 2, 2012, judgment entry of sentence indicates that Appellant was sentenced to an agreed sentence of four years on count one, to be served consecutively to an additional one-year sentence imposed in a separate case, for a total, aggregate sentence of five years.[2] Appellant did not appeal from that judgment.

{¶3} Appellant next filed a "Petition to Vacate or Set Aside Judgment of Conviction or Sentence" on April 25, 2013. The State filed a motion contra

[1] In *State v. Kelley*, *supra*, we noted Appellant's name had been misspelled in the trial court proceedings. The correct spelling of his name is "Kelly."

[2] The other case was identified as 12CR000057, most likely the same case as 12-CR-57, which was referenced in a September 19, 2012, motion to consolidate filed by the State. The nature of the other case does not appear in the record, and it does not appear that the two cases were actually consolidated. The "Findings of Fact and Conclusions of Law" appealed from indicates the charge was "Escape."

Appellant's petition to vacate on May 29, 2013. The trial court issued an entry denying Appellant's petition on June 17, 2013, which did not state the reason for the denial and did not contain findings of fact and conclusions of law in support of the decision. Appellant appealed the June 17, 2013 entry with three assignments of error. However, we declined to reach the merits of the appeal because, as previously indicated, we found the June 17, 2013 entry did not constitute a final, appealable order.

{¶4} On June 10, 2014, the trial court journalized Findings of Fact and Conclusions of Law and denied Appellant's petition for post-conviction relief. On June 25, 2014, Appellant filed the notice of appeal herein denying his post-conviction relief petition filed pursuant to R.C. 2953.21. Appellee filed a motion to dismiss arguing Appellant's agreed sentence was not subject to review pursuant to R.C. 2953.08(D). In our decision dated August 18, 2014, we reiterated that post-conviction relief petitions are used to assert claims that there was a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio or United States Constitutions. We found because this case involves an appeal of an entry denying a post-conviction petition, we have jurisdiction to review the merits of Appellant's appeal. Thus, the matter is now before us once again, wherein Appellant has raised four assignments of error for our review.

ASSIGNMENTS OF ERROR

"I. WHETHER THE TRIAL COURT ABUSED IT'S (SIC) DISCRETION AND VIOLATED APPELLANT'S RIGHT TO DUE PROCESS UNDER THE OHIO'S (SIC) AND THE UNITED STATES CONSTITUTION; AND OHIO'S REVISED CODE, SECTIONS 2925.03; 2929.11; 2929.12; 2929.14; 2929.51, WHEN IT SENTENCED THE APPELLANT TO FOUR YEARS IN PRISON.[3]

II. APPELLANT'S SENTENCE FOR DRUG TRAFFICKING IS UNSUPPORTED BY EITHER SUFFICIENT EVIDENCE OR THE WEIGHT OF THE EVIDENCE.

III. THE TRIAL COURT'S SENTENCE(S) ARE CONTRARY TO OHIO REVISED CODE, SECTION 2925.03; 2929.14; 2929.19; 2923.24; 2925.11.

IV. APPELLANT HAS BEEN DENIED EFFECTIVE ASSISTANCE OF TRIAL COUNSEL AS GUARANTED (SIC) BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10, OF THE OHIO CONSTITUTION."

LEGAL ANALYSIS

{¶5} In filing a R.C. 2953.21(A)(1)(a) motion asking a trial court to vacate or set aside the judgment of conviction or sentence, a petitioner must state all grounds for relief on which he relies, and he waives all other grounds not so stated. *State v. Bennington*, 4th Dist. Adams No. 12CA956, 2013-Ohio-3772, ¶ 8, R.C. 2953.21(A). In determining whether substantive grounds for relief exist, the trial court must consider, among other things, the petition, the supporting

[3] Appellant characterized the foregoing as "Statement of the Issue." For our purposes, we have designated it as the first assignment of error.

affidavits, and the documentary evidence filed in support of the petition. *Bennington, supra*; R.C. 2953.21(C). It is a means to resolve constitutional claims that cannot be addressed on direct appeal because the evidence supporting the claims is not contained in the record. *State v. Shaffer,* 4th Dist. Lawrence No. 14CA15, 2014-Ohio-4976, ¶ 9; *State v. Knauff,* 4th Dist. Adams No. 13CA976, 2014-Ohio-308, ¶ 18.

> "State collateral review itself is not a constitutional right. *State v. Calhoun*, 86 Ohio St.3d 279, 714 N.E.2d 905 (1999), citing *State v. Steffen*, 70 Ohio St.3d 399, 410, 639 N.E.2d 67, 76 (1994), citing *Murray v. Giarratano*, 492 U.S. 1, 109 S.Ct. 2765 (1989). Further, a post-conviction proceeding is not an appeal of a criminal conviction but, rather, a collateral civil attack on the judgment. See *Steffen,* at 410, 639 N.E.2d at 76, citing *State v. Crowder,* 60 Ohio St.3d 151, 573 N.E.2d 652 (1991). Therefore, a petitioner receives no more rights than those granted by the statute."

{¶6} A trial court's decision granting or denying a post-conviction petition filed pursuant to R.C. 2953.21 should be upheld absent an abuse of discretion; a reviewing court should not overrule the trial court's finding on a petition for post-conviction relief that is supported by competent, credible evidence. *Bennington, supra*; *State v. Gondor,* 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 45. The term "abuse of discretion" connotes more than an error of judgment; it implies the court's attitude is unreasonable, arbitrary, or unconscionable. *Bennington, supra*; *State v. Adams,* 623 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

{¶7} Generally, a petitioner cannot raise, for purposes of post-conviction relief, an error that could have been raised on direct appeal. *Bennington, supra,* at ¶ 9; *State v. Hobbs,* 4th Dist. Meigs No. 09CA1, 2009-Ohio-7065, ¶ 5; (internal citations omitted.) In other words, if a petitioner fails to bring an appeal as of right, he cannot raise in a petition for post-conviction relief, those issues that should have been raised in a direct appeal. *Bennington, supra; Hobbs, supra,* (internal citations omitted.)

{¶8} Appellant first argues the trial court abused its discretion when it sentenced him to four years in prison. Appellant vaguely references R.C. sections 2925.03; 2929.11; 2929.12; 2929.14; and 2925.51. Appellant also contends that his sentence is contrary to law pursuant to R.C. 2925.03; 2929.14; 2929.19; 2923.24; and 2925.11. We will consider these arguments together.

{¶9} The crux of Appellant's argument is that the State failed to establish that: (1) Appellant engaged in any drug transaction or (2) Appellant purchased the quantity of cocaine required by the statute with which he was charged.[4] Appellant contends the Ohio Bureau of Criminal Identification and Investigation (Ohio BCI&I) laboratory report dated September 12, 2011, which expressed the actual amount of cocaine found, was kept from Appellant's knowledge and understanding

[4] In count one of the indictment, Appellant was charged pursuant to R.C. 2925.03(A)(1)/(C)(4)(f), which stated "between the 26th day of July 2011 and the 27th day of July 2011," Appellant did "knowingly sell or offer to sell a controlled substance, the drug involved being cocaine or a compound, mixture, preparation, or substance containing cocaine; to wit: Crack Cocaine, in an amount (sic) in an amount equal to or exceeding twenty-five grams but less than one hundred grams."

of his defense. Appellant argues he should have been charged with a felony of the fourth degree in count one.

{¶10} Appellee responds that Appellant failed to mention his concerns during the plea hearing or sentencing hearing and has failed to request hearing transcripts to support his claims. Appellee also argues that Appellant has neglected to mention that he and his co-defendants sold most of the drugs prior to arrest and that statements included in the police report and provided as part of discovery indicate Appellant admitted this to officers at the time. The record before us reveals as follows:

> December 14, 2011- Defendant filed for discovery and bill of particulars.
>
> December 16, 2011- State of Ohio filed a response to discovery and requested reciprocal discovery.
>
> December 19, 2011- Defendant filed a waiver of time.
>
> January 18, 2012- Defendant's attorney, Sterling Gill, filed to withdraw. Defense attorney Sean Boyle filed a notice of appearance.
>
> April 16, 2012- Court issued a bench warrant for Defendant's failure to appear.
>
> May 3, 2012- State of Ohio filed two supplemental discoveries including one to provide lab reports, as well as the analyst's information and one to provide the criminal records of the Appellant and his co-defendants.
>
> May 4, 2012- State of Ohio filed supplemental discovery to include additional criminal records.

May 7, 2012- State of Ohio filed supplemental discovery.

July 10, 2012- State of Ohio filed supplemental discovery to include additional witnesses, diagrams and photos.

July 26, 2012- State of Ohio filed supplemental discovery to include co-defendants as witnesses.

September 25, 2012- Defendant entered pleas to two counts.

{¶11} The record indicates the September 12, 2011 lab report was provided as part of the State's initial response to discovery on December 16, 2011. The Portsmouth Police Department report with co-defendants' statements was provided on the State's supplemental disclosure of May 3, 2012. Appellant did not enter a plea until September 25, 2012. Appellant's arguments that there was no evidence he participated in selling or offering to sell drugs, and that he was never made aware of the lab report are not credible.

{¶12} We further observe Appellant opted not to provide a transcript of the sentencing proceeding. App.R. 9(B) provides "At the time of filing the notice of appeal the appellant, in writing, shall order from the reporter a complete transcript or a transcript of the parts of the proceedings not already on file as the appellant considers necessary for inclusion in the record and file a copy of the order with the clerk." When it is necessary to the disposition of any question on appeal, the appellant bears the burden of providing a transcript. *Mumma v. Cooper,* 4th Dist. Washington No. 02CA11, 2003-Ohio-2507, ¶ 5; *Rose v. Chevrolet, Inc. v. Adams,*

36 Ohio St.3d 17, 19, 520 N.E.2d 564 (1988). In the absence of a transcript, we must presume regularity in the trial court proceedings. *Mumma, supra*; *Hartt v. Munobe*, 67 Ohio St.3d 3, 7, 615 N.E.2d 617 (1993); *Knapp v. Edwards Laboratories*, 61 Ohio St.3d 197, 199, 400 N.E.2d 384 (1980). The trial court's June 10, 2014 entry, "Findings of Fact and Conclusions of Law," states in pertinent part:

> "The Court finds that Defendant entered a plea of guilty to one count of Trafficking in Drugs and one count of Escape (in case number 12CR057) in exchange for a total five (5) year prison term, four (4) years on the above captioned case and one (1) year on case number 12CR057. The court finds these were agreed sentences and Defendant did not file an appeal."

In denying Appellant's petition, the trial court went on to say:

> "1. Defendant takes exception to the sentence imposed despite the fact they were agreed sentences. Consecutive sentencing was part of the plea agreement, and Defendant cannot now claim he was improperly sentenced to consecutive sentences after entering a plea arrangement with a knowing, intelligent, and voluntary waiver of his rights."

{¶13} The trial court's entry explicitly states Appellant's sentence is an "agreed sentence." Because Appellant failed to provide the transcript of sentencing, we presume the regularity of the proceedings.

{¶14} A defendant's right to appeal a sentence is based on specific grounds stated in R.C. 2953.08(A). Subsection (D)(1) provides an exception to the defendant's ability to appeal:

> "A sentence imposed upon a defendant is not subject to review under this section if the sentence is authorized by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge." *State v. Underwood*, 124 Ohio St.3d 365, 922 N.E.2d 923, ¶ 15 .

{¶15} A sentence that is "contrary to law" is appealable by a defendant; however, an agreed-upon sentence may not be if: (1) both the defendant and the state agree to the sentence, (2) the trial court imposes the agreed sentence, and (3) the sentence is authorized by law. R.C. 2953.08(D)(1); *Underwood*, at ¶ 16. If all three conditions are met, the defendant may not appeal the sentence.[5]

{¶16} Assuming the regularity of these proceedings, we have no reason to believe all three conditions were not met in Appellant's case. Appellant's agreed sentence is not reviewable on appeal. *State* v. *Kemp*, 2nd Dist. Clark No. 2014CA32, 2014-Ohio-4607, ¶ 16. We find the trial court did not abuse its discretion when it denied Appellant's post-conviction motion due to the nature of the agreed sentence. As such, we overrule Appellant's assignments of error with regard to his sentence.

{¶17} Appellant also argues his sentence is unsupported by sufficient evidence or the weight of the evidence. However, we find his arguments as to

[5] A sentence is "authorized by law" and is not appealable within the meaning of R.C. 2953.08(D)(1) only if it comports with all mandatory sentencing provisions. *Underwood, supra* at ¶ 20. A trial court does not have the discretion to exercise its jurisdiction in a manner that ignores mandatory statutory provisions. *Id.* The *Underwood* court also noted its holding did not prevent R.C. 2953.08(D) from barring appeals that would otherwise challenge the court's discretion in imposing a sentence, such as whether consecutive or maximum sentences were appropriate under certain circumstances. *Id.* at ¶ 22.

sufficiency and weight of the evidence should have been raised in a direct appeal and are now barred by res judicata. "[R]es judicata applies to proceedings involving post-conviction relief." *State v. Shaffer,* ¶ 16, quoting *State v. Burton,* 4th Dist. Gallia No. 13CA12, 2014-Ohio-2549, ¶ 17, citing *State v. Szecyk* 77 Ohio St.3d 93, 95, 671 N.E.2d 233 91996). Under the doctrine of res judicata, a court may not consider issues that a defendant raised or could have raised on direct appeal in post-conviction relief proceedings. *State v. Damron,* 4th Dist. Ross No. 10CA3158, 2010-Ohio-6459, ¶ 20; *State v. Nichols,* 11 Ohio St.3d 40, 41-42, 463 N.E.2d 375 (1984). Post-conviction relief is available only for errors based upon facts and evidence outside the record, which would not be reviewable on direct appeal. *Damron, supra*; *State v. Rodriguez,* 65 Ohio App.3d 151, 153, 583 N.E.2d 347 (1989) (per curiam). In *State v. Brown,* 7th Dist. Mahoning No. 13MA176, 2014-Ohio-4008, ¶ 14, the appellate court observed:

> "[T]he issues raised in the postconviction petition were sufficiency and manifest weight of the evidence, being found guilty of a lesser included offense, maximum and consecutive sentences, and ineffective assistance of counsel claims. All of these issues could have been raised in the direct appeal. *State v. Damron*, 4th Dist. No. 10CA3158, 2010-ohio-6459, 21 (manifest weight argument raised in petition for postconviction relief was barred by res judicata because it could have been raised in the direct appeal); *State v. Bradley*, 8th Dist. No. 88163, 2007-Ohio-2642, ¶ 10 (argument that evidence supporting conviction is insufficient could have been raised in direct appeal and therefore is barred by res judicata when raised in petition for postconviction relief); *State v. Tillman*, 6th Dist. No. H-02-049, 2003-Ohio-4216, ¶ 11-12 (maximum sentence issue is barred by res judicata for purposes of post-conviction relief because it could have been

> raised in direct appeal); *In re T.L.*, 8th Dist. No. 100328, 2014-Ohio-1840, ¶ 16 (ineffective assistance of counsel claim that does not rely on evidence outside of the record should be filed on direct appeal or else it is barred under the doctrine of res judicata)…"

{¶18} As to the second assignment of error, we find the trial court did not abuse its discretion in overruling Appellant's post-conviction motion. As such, we overrule the second assignment of error.

{¶19} Finally, in his last assignment of error, Appellant argues ineffective assistance of counsel. He alleges his counsel never mentioned or explained the nature of the charge to him, and the sufficiency of the evidence in that the "discrepancy" in the weight of the substance was never revealed to him by his counsel. In Appellant's affidavit attached to his post-conviction motion for relief, he indicates he was "intimidated by counsel with facing (13) years in prison should the case go to a jury trial and Affiant lost." The only evidence of this assertion comes from Appellant's own self-serving affidavit. "[T]his evidence by itself is insufficient to mandate a hearing or to justify granting [a] petition for postconviction relief." *State v. Davis*, 12th Dist. Butler No. CA2012-12-258, 2013-Ohio-3878, ¶ 27, quoting *State v. Isbell*, 12th Dist. Butler No. CA2003-06-152, 2004-Ohio-2300, ¶ 14, citing *State v. Kapper*, 5 Ohio St.3d 36, 38 (1983) (internal citations omitted.) Without more, we find the trial court did not abuse its discretion in denying Appellant's post-conviction motion based on the ineffective assistance claim.

{¶20} Based on the above, we overrule Appellant's assignments of error and affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and costs be assessed to Appellant.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Scioto County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Harsha, J. & Hoover, J.: Concur in Judgment and Opinion.

For the Court,

BY: _____
Matthew W. McFarland, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.